United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,108

FEDERAL TRADE COMMISSION, ET AL., *Appellants*,

v.

THE AMERICAN OIL COMPANY, *Appellee*.

No. 13,109

SIGURD ANDERSON, ET AL., *Appellants*,

v.

THE AMERICAN OIL COMPANY, *Appellee*.

Appeals From an Order of the United States District Court for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit
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QUESTION PRESENTED

Whether the Quantity Limit Proviso of the Robinson-Patman Act authorizes the Federal Trade Commission to promulgate a quantity limit rule requiring AMOCO to pay the same price for its private brand tires as is paid by the purchaser of the manufacturer's brand, notwithstanding that AMOCO takes delivery at the factory and assumes the costs of transportation, promotion, and distribution which are included in the price to the purchaser of the manufacturer's brand of tires.

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BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

Appellee, The American Oil Company (hereinafter called "AMOCO"), is one of twenty appellees whose cases are consolidated on this appeal. With respect to most of the issues raised, AMOCO is in the same position as the appellees who have filed a joint brief, and we subscribe

fully to that brief. This brief, however, will be devoted to the particular facts of AMOCO's tire business and show that AMOCO's *method* of carrying on its replacement tire business is expressly excluded from the Quantity Limit Proviso of the Robinson-Patman Act, on the basis of which the Federal Trade Commission purports to have issued its challenged Quantity Limit Rule.

Section 2 (a) of the Robinson-Patman Act outlaws price discriminations which are injurious to competition, with the proviso that

> "[N]othing . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing *methods* or *quantities* in which such commodities are . . . sold or delivered". (Emphasis added.)

Under the further "Quantity Limit Proviso", the Commission may, after due investigation and hearing, bar cost-justified price differentials by establishing

> "[Q]uantity limits . . . where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly . . ."

The Commission's Quantity Limit Rule 203-1 provides that:

> "The quantity limit as to replacement tires and tubes made of natural or synthetic rubber for use on motor vehicles as a class of commodity is twenty thousand (20,000) pounds ordered at one time for delivery at one time."

AMOCO buys its private brand tires from a tire manufacturer under a cost-plus contract. AMOCO assumes some of the costs of manufacture, by, among other things, supplying the necessary molds. And it takes over all of the responsibilities and costs of selling and sales promo-

tion, handling, warranties, warehousing, and transportation. Of necessity, the price paid by AMOCO is substantially less than that paid to the same manufacturer by a retailer who gets tires carrying the manufacturer's advertised brand name delivered to his establishment.

Despite the entirely different *method* of purchasing by AMOCO, and the substantial difference in cost to the manufacturer in serving AMOCO, as compared with the individual retailer, the Commission proposes, under its Quantity Limit Rule directed at price differentials based on *quantity* to bar AMOCO from buying at any lower price than the retailer who has 20,000 lbs. of advertised brand tires delivered at one time to his establishment.

Although the ostensible purpose is to prevent monopoly, the necessary effect is to destroy AMOCO's tire business and thereby seriously curtail competition in the tire industry.

COUNTERSTATEMENT OF THE CASE*

AMOCO has been engaged in the marketing of petroleum products along the eastern seaboard of the United States for many years. As an adjunct to the sale of petroleum products, AMOCO also distributes and sells replacement

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* The *facts* upon which the Court must decide this case insofar as AMOCO is concerned are those found in AMOCO's verified complaint appended to this brief, supplemented by the affidavit of James K. Eagan, Jr., Associate General Counsel of the American Oil Company, (J.A. 252-257), and the affidavit of Robert M. Parrish filed by appellants (J.A. 140-167). As is apparent from the affidavit of Robert M. Parrish, the facts upon which the appellant Commission bottomed Rule 203-1 are unsworn. They were drawn from "files of many investigations conducted by it over a period of years", the "reports of many Congressional committees and government agencies", and a "plethora of material either submitted to the Commission in confidence or developed by it from confidential sources" (J.A. 144, 150).

The "facts" in the Public File (see *Philadelphia Co.* v. *Securities & Exchange Com.*, 84 U.S. App. D.C. 73, 175 F. 2d 808, vacated as moot, 337 U.S. 901 (1949)), gratuitously denominated "record" by appellants, not being premised on testimony under oath, may not be considered in this appeal from the grant of appellees' cross-motion for summary judgment.

tires and tubes for motor vehicles bearing its own trademark and brand designation, "AMOCO". These "private brand" tires and tubes are sold by AMOCO to approximately 7,700 retail service station dealers and to over 350 distributors and jobbers who in turn serve an additional 6,800 retail dealers. This replacement tire business is a vital part of AMOCO's operation (Compl. pars. 2, 10 and 11).*

For a number of years AMOCO has purchased the private brand tires and tubes it resells from one of the smaller tire manufacturers, Mansfield Tire and Rubber Company (herein called "Mansfield"), under what has been characterized as a cost-plus contract. Under the provisions of this contract Mansfield manufactures tires and tubes for AMOCO carrying its private brand name and sells such tires and tubes to AMOCO at a price equivalent to manufacturing cost plus six per cent (Compl. par. 12).

The only function which Mansfield performs is manufacturing. AMOCO even supplies the tire molds used by Mansfield in the manufacture of "AMOCO" tires. AMOCO bears the expense of laboratory testing and of ascertaining the proper design and composition of such tires and tubes. AMOCO also assumes all the costs of bringing the tires and tubes to the market place. Thus, AMOCO takes delivery at the Mansfield factory gate and incurs all transportation costs from that point. In performing the distribution function, AMOCO maintains principal storage warehouses in twelve states and the District of Columbia and over 100 sub-warehouses and storage facilities throughout its eighteen-state marketing territory (J.A. 256, 254; Compl. pars. 11, 12 and 13). AMOCO also bears the considerable costs of selling,

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* To facilitate this court's consideration of the issues involved in the appeal, AMOCO's verified complaint is set forth in an appendix to this brief. All other references are to the Joint Appendix.

advertising, and promoting its private brand tires and tubes. AMOCO, and not Mansfield, handles all compliance with warranties and replacement of defective tires and tubes, and bears the entire cost thereof. Applicable federal and state excise taxes are paid by AMOCO (J.A. 256; Compl. par. 13).

Mansfield also manufactures tires and tubes bearing its own nationally advertised brand name, which are sold in competition with AMOCO brand tires and tubes. Here Mansfield bears not only the manufacturing costs but also all the additional costs of selling, warehousing, handling, transportation, compliance with warranties, advertising, and promotion of its own national brand tires and tubes.

It is not surprising, then, that AMOCO pays a lower price to Mansfield than do purchasers of the Mansfield brand. *AMOCO pays less because it gets less,* and not because of the quantities involved. On the prior appeal of this case this Court's reaction was that cost-plus contracts "seemingly do not involve quantity differentials."*

Quantity Limit Rule 203-1, applied to cost-plus contracts, would require AMOCO to pay the same price for its private brand tires and tubes as the price Mansfield charges carload purchasers of its own nationally advertised brand. The result is easily foreseen. Because it cannot afford to pay the marketing and distribution costs twice, once by performing these functions itself and again by paying Mansfield for services not rendered, AMOCO will be driven from the replacement tire and tube business.

The presence of AMOCO and other cost-plus private brand purchasers contributes greatly to the competition in the replacement tire industry. They increase the range and variety of choice of brands of tires and attendant services available to consumers. They compete with the

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* *B. F. Goodrich Co.* v. *Federal Trade Commission,* 93 U.S. App. D.C. 50, 53 n. 3; 208 F. 2d 829 (1953).

tire manufacturers at every stage except in the actual process of manufacture. Should AMOCO and other cost-plus purchasers be driven from the market by the application of Rule 203-1 to their businesses, fewer suppliers will be available to wholesalers, retailers and consumers. Many fewer alternatives in brands of tires, varieties of service, and types of outlets will be available to consumers. Rule 203-1 will, therefore, if applied to AMOCO's cost-plus contract and other such contracts, have none of the effects at which the Quantity Limit Proviso is aimed. On the contrary, it will bring about a distinct lessening of competition. (Eagan Affidavit, J.A. 255)

SUMMARY OF ARGUMENT

I.

The Cost Justification Proviso of the Robinson-Patman Act exempts from the Statute's prohibitions "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing *methods or quantities* in which such commodities are to such purchasers sold or delivered." (Emphasis added). The Quantity Limit Proviso follows, as a proviso to the Cost Justification Proviso. It states that the Federal Trade Commission "may . . . fix and establish *quantity* limits" in certain cases, and that, when the Commission has done so, the Cost Justification Proviso "shall then not be construed to permit differentials based on differences in *quantities* greater than those so fixed and established". The word "quantities" must be interpreted to mean the same thing in each of these closely integrated provisos. Since a clear distinction is made between "quantities" and "methods" in the Cost Justification Proviso, "quantities" cannot be read as meaning or including "methods" in the Quantity Limit Proviso. The Commission has no rule-making authority, therefore, over *method* differentials.

The plain statutory distinction between *quantity* and *method* differentials is supported by the Act's legislative history and economic rationale.

II.

The Commission concedes that its formal findings do not support Rule 203-1, and even less do the findings support the application of the Rule to AMOCO's cost-plus contract.

The Statement of Basis and Purpose relies on two arguments to convert AMOCO's *method* differential into a *quantity* differential.

The first argument is based upon the case of *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission,* 101 F. 2d 620 (C.A. 6th, 1939). The claim is that this case, brought under unamended Section 2 of the Clayton Act, held that cost-plus contracts involve quantity differentials. The Commission argues that Congress, with Goodyear's so-called "escape" in mind, incorporated the Quantity Limit Proviso into the Robinson-Patman Act to give the Commission power over both *quantity* and *method* differentials. The Commission conveniently overlooks the fact that the *Goodyear* case was not finally decided until *after* the Robinson-Patman Act was passed, and never held, or even implied, that cost-plus contracts are in fact quantity discount arrangements. The statute and the legislative history leave no doubt of the purpose of Congress to exclude *method* differentials from the Quantity Limit Proviso. The second is that, since cost-plus purchasers buy in quantity, their lower prices are "on account of" quantity. This reasoning overlooks that, while a cost-plus purchaser may buy in volume in order to spread the fixed costs of performing distribution functions, the lower price paid by the cost-plus purchaser is accounted for by the fact that he assumes many of the costly operations otherwise performed by the manufacturer. If the

savings to the manufacturer from the cost-plus *method* did not substantially off-set the lower price, the cost justification defense would not be available and there would be no need to bring the Quantity Limit Proviso into play.

The Commission's brief apparently concedes, as it must, that at least some of the differential granted a cost-plus purchaser is a *method* differential. The Commission then contends that where *quantity* and *method* differentials are intermingled, a quantity limit may be imposed and the burden of proving what part is due to *method* is cast upon the person granting or receiving the differential.

However, the Commission has not established the amount of differential in cost-plus contracts claimed to be based on quantity. If the Commission is conceivably correct in seeing mixed *quantity* and *method* differentials here, which is not conceded, summary judgment must, nevertheless, be granted AMOCO because of the Commission's failure to make findings as to the size of the *quantity* differential. Until the magnitude of the *quantity* differential is shown, the other findings required by the statute cannot be made, i.e., that available purchasers for the quantities involved are so few that the quantity discount granted is unjustly discriminatory or promotive of monopoly.

ARGUMENT

I.

THE ROBINSON-PATMAN ACT DOES NOT PERMIT THE FEDERAL TRADE COMMISSION TO APPLY A QUANTITY LIMIT RULE TO PRICE DIFFERENTIALS GRANTED ON ACCOUNT OF DIFFERING "METHODS" OF SALE AND DELIVERY.

That the Commission lacks authority to limit *method* differentials is clear on the face of the statute and from the expressions of legislative intent and purpose.

The Text of the Quantity Limit Proviso Does Not Embrace Method Differentials.

Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, U.S.C. Title 15, Section 13 (a), prohibits price discriminations under certain conditions. Integral parts of Section 2 (a) are the Cost Justification and Quantity Limit Provisos, which read as follows:

> "*Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing *methods or quantities* in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish *quantity* limits . . . where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established . . ." (Emphasis added.)

The close interrelation of the two provisos is obvious, both from their form and their substance. The phrase, "*Provided, however,*" is used instead of "*And provided further*". The latter phrase is used elsewhere in Section 2 (a) when independent provisos are involved. Thus, in form the Quantity Limit Proviso is a modification of the Cost Justification Proviso.

In terms of substance, the interdependence of these provisos is even clearer. The first permits method *or* quantity cost justification of a price differential. The second proviso authorizes the Commission to limit only *quantity* differentials. "Method" is omitted from the Quantity Limit Proviso. The Quantity Limit Proviso then states that "the foregoing" (the Cost Justification Proviso) shall not be construed to permit *quantity* cost

justification beyond the *quantity* limits set by the Commission.

The statutory word "quantities", then, is not only repeated in the same section of the same statute, it is used in each of two clauses or provisos which are mutually dependent. The word must, therefore, be construed to mean precisely the same thing in one clause as in the other. In the Cost Justification Proviso, the words "quantities" and "methods" are employed in the disjunctive. An explicit distinction is made between them. "Quantities" may not, therefore, be construed to mean or include "methods" in the Quantity Limit Proviso.

It follows inexorably that *quantity* differentials alone are subject to the rule-making authority conferred by the Quantity Limit Proviso. Indeed, the statute is here so plain and unambiguous that the Commission, although avowing the applicability of the statute to cost-plus contracts, has not even attempted to construe the language as conferring the power it seeks over *method* differentials.*

This Court has previously recognized the statutory distinction between *method* and *quantity* differentials and that the Quantity Limit Proviso applies only to quantity differentials. *B. F. Goodrich Co.* v. *Federal Trade Commission,* 93 U.S. App. D.C. 50; 208 F. 2d 829 (1953).

Congress Condemned Only Inordinate Quantity Discounts.

The legislative history of the Robinson-Patman Act further demonstrates that Congress acted with a clear distinction between *quantity* and *method* differentials in mind. For example, Representative Utterback, the Chairman of the House conferees in the House-Senate conference on the Robinson-Patman Bill, explained to the

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* The Commission's attempt to show that the *Goodyear* decision, three years after the passage of the Robinson-Patman Act, formed the basis for the legislative intent behind the Act is considered below (infra p. 15 *et seq.*).

House the bill which emerged from the conference in a final, definitive statement just prior to passage:

> "The differential granted a particular customer must be traceable to some difference between him and other particular customers, *either* in the *quantities* purchased by them *or* in the *methods* by which they are purchased or their delivery taken."*

Deliberately contrasting the two concepts, Representative Utterback gave five "examples" as "illustrative" of differentials justified by *methods* of purchase but not by *quantities* purchased.**

In enacting the Quantity Limit Proviso, on the other hand, Congress was exclusively concerned with the possible anti-competitive impact of *quantity* discounts.

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* 80 Cong. Rec. 9417 (1936).

** (1) "As between purchasers in equal quantities, for example, where one takes multiple store-door delivery, and the other single warehouse delivery, with consequent savings in trucking or other delivery costs to the seller, that saving may be expressed in a price differential";

(2) "Or where one places a single order calling for periodic deliveries over an extended period of time, whereas the other places smaller successive orders requiring more frequent and therefore more costly salesman solicitation, such a difference in cost may be expressed in a price differential";

(3) "Or where one customer, devoid of storage facilities, requires spot deliveries during the rush of the season, for which the manufacturer must produce in advance and store himself in order to make the fullest utilization of his plant capacity; while another customer orders for delivery in off seasons, handling the storage himself and saving the manufacturer that cost, such a saving may be expressed in a price differential";

(4) "Or where one customer orders from hand to mouth during the rush of the season, compelling the employment of more expensive overtime labor in order to fill his orders; while another orders far in advance, permitting the manufacturer to use cheaper off-season labor, with the elimination of overtime, or perhaps to buy his raw materials at cheaper off-season prices, such savings as between the two customers may likewise be expressed in price differentials";

(5) "So also where a manufacturer or merchant sells to some customers through traveling-salesman solicitation, to others across the counter, and to others by mail order from catalog, price differentials may be made to reflect the differing costs of such varying methods of sale." (*Ibid.*)

Senator Logan's explanation to the Senate defines the aim of this provision:

> "The discounts which they receive by *reason of the size of their purchases* must be unjustly discriminatory or promotive of monopoly before the Federal Trade Commission may consider them.
>
> ". . . what we had in mind in the consideration of this provision was that there might be one concern or two concerns with such purchasing power that they could buy in such tremendous quantities that they would be buying without competition, and that if such an occasion should arise, and the discounts secured *by reason of large purchases* would tend to promote monopoly or be unjustly discriminatory, then the Federal Trade Commission, after hearing all parties, should have power to say: 'Above a certain *quantity* you shall not have any quantity discounts'."*

The legislative rationale in confining the Commission's rule-making authority to *quantity* differentials is apparent. Purchases may be so large that even cost-justified *quantity* discounts will enable the buyer to gain a monopoly.

On the other hand, *method* differentials, involving offsetting costs to the purchaser, cannot have such an effect. The buyer who receives a *quantity* discount does not necessarily incur any additional costs because of the quantities in which he purchases. But the buyer who receives a *method* differential does so because he has incurred costs which would otherwise be borne by the seller. A *quantity* differential may conceivably enable its recipient to undersell competitors, but a *method* differential merely shifts certain costs from the seller to the buyer.

The Commission attempts to show probable competitive injury by pointing to alleged quantity discounts accorded large purchasers ranging from 26% to 30.5% on pas-

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* 80 Cong. Rec. 6428 (1936). (Emphasis added.)

senger tires and from 32% to 40% on truck tires, over and above the discounts received by the smallest purchasers (Statement of Basis and Purpose, J.A. 22). But the Commission completely overlooks the fact that the price differentials reflect substantial differences in what the buyer gets. The inference sought to be drawn by the Commission that a larger purchaser can profitably resell at the buying price of the smallest purchasers is exposed by Commissioner Mason in his dissent:

> ". . . [T]he majority has reasoned that every price difference which appears in the record reflects an equivalent advantage to the concern paying the lower price. Where some buyers pay the transportation and others do not, it is obvious that a price concession equal to the transportation cost incurred by the buyer gives him no advantage at all. Similarly, he obtains no advantage from price concessions which merely recognize other items of expense that he may be required to assume." *

AMOCO's method of purchasing is a graphic illustration of the point. AMOCO supplies tire molds and gets unadvertised tires delivered at the factory gate. Purchasers of Mansfield's brand of tires do not contribute to the manufacturing operation and get nationally advertised tires delivered at their store doors. The manifold costs of selling and promotion and delivering AMOCO tires to retailers is the equivalent of the cost of getting Mansfield's tires to its retailer customers. *AMOCO's lower purchase price is due to the costs shifted from Mansfield to AMOCO.*

Interdiction of Method Differentials Would Thwart Statutory Objectives.

Although the *method* differentials present here cannot conceivably affect competition adversely, the same innocuousness cannot be attributed to Quantity Limit Rule 203-1. The application of that rule to cost-plus private

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* J.A. 46.

brand purchasers will compel such purchasers to pay the same price as purchasers of sellers' brand tires. But the cost-plus purchasers will still have to perform the distribution and marketing functions while the purchasers of sellers' brand tires will not. The stark fact is that the result will be to drive AMOCO and other private brand cost-plus purchasers out of the replacement tire business, thus reducing materially the number of competitors in the field.

The application of Rule 203-1 to cost-plus purchasers is an arbitrary and unjust discrimination against one group of competitors.* The Commission's declared intention to apply the rule to the *method* differentials received by cost-plus purchasers is foreclosed by the express terms of the statute, by the legislative history, and by the Act's economic rationale.

If the Commission's attempt succeeds, and the destruction of AMOCO's tire and tube business is accomplished, Rule 203-1 will itself be "promotive of monopoly."

II.

NEITHER THE FEDERAL TRADE COMMISSION'S FORMAL FINDINGS NOR ITS STATEMENT OF BASIS AND PURPOSE SUPPORT THE AVOWED APPLICATION OF RULE 203-1 TO COST-PLUS PURCHASERS.

The Commission's formal findings clearly fail to support the declared application of Rule 203-1 to cost-plus contracts. The Commission concedes that the formal

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* Here, as in *Continental Distilling Co.* v. *Humphrey*, 95 U.S. App. D.C. 104, 220 F. 2d 367 (1954), such arbitrary action would defeat the statutory purpose as well as unjustly discriminate against "one part of the trade . . . in comparison with others"—and this "would place the ruling or regulation outside the statute upon which it purports to rest". *Id.* at 372.

Since the allegations in AMOCO's complaint raise substantive issues comparable to those in *Continental*, there are factual issues raised which entitle AMOCO to a plenary hearing before the District Court. The lower court so found (J.A. 302). Consequently, appellants' motion for summary judgment could not be granted in any event.

findings do not even support the application of the Rule to straight quantity discounts (Appellants' Brief, p. 20). Much less do the findings support the notion that cost-plus contracts are, in reality, quantity discount contracts. The findings do not even mention cost-plus contracts or private brand purchasers (J.A. 19-20).

The Commission relies upon its Statement of Basis and Purpose to correct the admitted deficiencies of its formal findings. The Statement, however, is completely inadequate to the task.

The Statement of Basis and Purpose attempts to justify the application of Rule 203-1 to cost-plus purchasers by two paths: (1) an analysis of the *Goodyear* case which is said to demonstrate both that Congress, with that case in mind, passed the Quantity Limit Proviso to reach cost-plus contracts, and that the case holds that cost-plus contracts involve quantity discounts; and (2) proof that cost-plus purchasers are usually volume dealers, which is said to prove that their lower prices result from quantities purchased. These arguments will be considered separately.

The "Goodyear Case" Does Not Convert Method Differentials Into Quantity Differentials.

The Commission's argument from the *Goodyear* case in its Statement of Basis and Purpose rests upon rather obvious sleight of hand.

With respect to the effect of the *Goodyear* decision upon Congress' intent in enacting the Cost Justification and Quantity Limit Provisos, the Commission's logic in the Statement of Basis and Purpose runs as follows (J.A. 23):

> In the *Goodyear* case, which arose under unamended Section 2 of the Clayton Act,* respondent successfully

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* Prior to amendment by the Robinson-Patman Act, Section 2 of the Clayton Act read as follows:

> "That it shall be unlawful for any person . . . either directly or indirectly, to discriminate in price between different purchasers . . . where

contended that the lower price paid by a cost-plus tire purchaser was on account of quantity and, for that reason, was not required to be cost-justified under the unamended Section 2.

"Thereafter, and with the *Goodyear* case as a major consideration, the cost proviso was amended and the quantity-limit proviso was added by the Robinson-Patman Act."

The new Cost Justification Proviso "closed the loophole through which Goodyear had escaped" by requiring cost justification for price differentials due to "differing methods or quantities". This language did not create two categories of differentials, "(one on 'account of quantity', and the other 'on account of method') . . . but all differentials are limited to those that can be justified by differing methods, differing quantities, or both, with no necessity for distinction."

"In contrast to unamended Section 2, which did not cover differentials on account of quantity, the quantity-limit proviso is concerned only with such differentials. It follows that differentials which escaped the reach of unamended Section 2 because they were on account of quantity are, for that reason, clearly subject to the quantity-limit proviso."

The central distortion contained in the foregoing rationale is made possible by only one fact: *there are two Goodyear decisions.** Only by shifting imperceptibly from one to the other and using the term "the *Goodyear* case" both for the legal principle there at issue and the factual character of Goodyear's discount can the Commission impart any semblance of plausibility to its position.

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the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition . . ."

* 22 F.T.C. 232 (1936); 101 F. 2d 620 (6th Cir. 1939).

One *Goodyear* decision, that of the Commission in 1936, held that the differential granted a cost-plus purchaser *was not on account of quantity* and could not be viewed thus unless cost-justified. *Matter of Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936).

The other *Goodyear* decision, *handed down three years after the passage of the Robinson-Patman Act*, reversed the Commission, and held that, under unamended Section 2, quantity discounts did not have to be cost-justified—and also that the Commission's findings that Goodyear's discounts were *not* on account of quantity were vitiated by its misinterpretation of the statute and the attendant application of improper standards. *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission*, 101 F. 2d 620 (6th Cir. 1939).

The Commission blandly attaches the 1936 date of *its Goodyear* decision to a misstatement of the Court of Appeals' decision (J.A. 22-23). The misconception is created that when Congress passed the Robinson-Patman Act it was aware that Goodyear had in fact "escaped" on the ground that it granted a cost-plus contract differential that was held to be "on account of quantity". But Goodyear did not "escape" until three years after the Act's passage, and the Court of Appeals never determined that Goodyear's discounts were *in fact* granted "on account of quantity". Congress in plugging the "loophole" in unamended Section 2 may thus have considered the statutory interpretation at issue in the *Goodyear* litigation, but could not have understood Goodyear's discounts as being "on account of quantity". For the Commission in 1936 had held just the contrary, and the 1939 reversal did not rewrite the Commission's findings.

When this fact is understood it demolishes the Commission's contention that the Quantity Limit Proviso of 1936 was intended to apply to cost-plus contracts no matter what kind of differentials they create. The Commission thus fails in its attempt to alter the plain meaning and intent of

the Quantity Limit Proviso, which is that the Commission may limit *quantity* differentials but not cost-justified *method* differentials.

The Commission maintains that, in any event, the 1939 *Goodyear* case held that lower prices granted to a cost-plus purchaser are "on account of quantity". The conclusion is then drawn that the Commission may apply a quantity limit rule to cost-plus contracts. But, as has already been indicated, this premise is false. The Court of Appeals nowhere said or implied that the cost-plus contract was based on quantity. With respect to the Commission's findings that prices under the Goodyear contract did not vary according to varying volume, that there was no quantity commitment in the contract, and that there was a lack of relation or proportionality between the contract discount and gradations of discounts to other dealers, all that the Court said was "These evidentiary circumstances do not of themselves, however, sustain an ultimate finding that the differential was not on account of quantity". (101 F. 2d 620, 624).*

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* In an attempt to salvage its version of the 1939 *Goodyear* case, the Commission's brief states: "The Supreme Court, in recently analyzing the *Goodyear* case, stated that the differentials granted to Sears by Goodyear were quantity differentials, granted to a quantity buyer by a quantity-discount seller. *Automatic Canteen Co. of America* v. *Federal Trade Commission*, 346 U.S. 61, 64 (1953)."

The exact statement of the Supreme Court in the *Automatic Canteen* case, however, was: "Chief among the inadequacies [of unamended Section 2 of the Clayton Act] had been express exemption of price discrimination in the sales of different quantities of like goods, an exemption that was interpreted as leaving quantity-discount sellers free to grant discounts to quantity buyers *that exceeded any cost savings in selling to such buyers.* Goodyear Tire & Rubber Co v. Federal Trade Commission, (CA 6th) 101 F. 2d 620." (Emphasis added.)

There is a crucial difference between saying the *Goodyear* case held that quantity-discount sellers were exempt from the Act and saying that Goodyear was, in actuality, a quantity-discount seller. Although the Commission appears to have some difficulty in grasping the distinction, it is quite apparent that the *Automatic Canteen* case made the first statement and not the second.

Cost-Plus Method Purchasers Do Not Receive Discounts on Account of Quantity.

As the second leg of its contention that cost-plus contract differentials are based on quantities purchased, the Commission's Statement of Basis and Purpose offers figures to show that differentials increase as quantities purchased rise (J.A. 22). This correlation, urges the Commission, demonstrates that the price differentials are on account of quantity. Analysis of the Commission's data, however, reveals that they are completely meaningless. As stated by Commissioner Mason (J.A. 46):

> "However, the price data that have been used in computing these spreads are not properly comparable. Prices paid by dealers at their own places of business, which include transportation charges, have been compared with prices paid by mass distributors at the factory door, which do not include transportation charges. No adjustment has been made for the fact that some mass distributors own the rubber from which their tires are made or the moulds in which the manufacture takes place, or waive the right enjoyed by the dealer to return defective tires. Less significant, but still worth noting, is the fact that no effort has been made to distinguish between prices paid in wholesale transactions by concerns that resell their tires to other dealers and prices paid in retail transactions by concerns that resell to the ultimate consumer . . . "

So long as the Commission insists on lumping cost-plus private brand purchasers together with other purchasers, its figures will show a correlation between volume and discount. All that the Commission's figures indicate is that cost-plus purchases are, on the average, larger than other purchases. No sensible man would expect it to be otherwise. It is simply not worthwhile for a small dealer or retailer to undertake to provide his own warehousing, transportation, promotion, and other services. Persons with large enough volumes to spread the costs of advertising and distributing their own brand of tires undertake

such functions. There is nothing sinister in that fact. But when a cost-plus purchaser assumes the functions of distribution and marketing, he necessarily also assumes their cost, and an equivalent cost saving accrues to the manufacturer.

It is on account of the shifting of costs from the manufacturer to the purchaser because of the purchaser's *method* of operation that the price is lowered. What is involved is a cost-justified *method* differential which the Commission is without authority to limit under the Quantity Limit Proviso.

Besides, it is not necessary for AMOCO to prove affirmatively that the differential is based on *method* of operation. The burden is upon the Commission, before it may impose a quantity limit rule, to show with reasonable certainty that the differential in question is due to *quantities* purchased. This burden is not carried by reliance on price data which fail completely to take into account what the buyer receives—whether an unadvertised tire delivered at the factory gate or a branded tire, fully warranted, delivered at the retail establishment.

Thus, neither of the arguments offered in the Statement of Basis and Purpose supports the application of Rule 203-1 to AMOCO's cost-plus contract with Mansfield.

The Failure of Commission's Brief to Support the Application of Quantity Limit Rule 203-1 to Cost-Plus Purchasers.

The Commission's brief is, for the most part, a rehash of the arguments advanced in the Statement of Basis and Purpose. Its one new theory would seem conclusively to sustain AMOCO's motion for summary judgment.

The Commission concedes, as indeed it must, that cost-plus purchasers perform services and furnish facilities at their own cost which the manufacturers perform and fur-

nish for purchasers of the manufacturers' brands of tires.* Conceding also that a differential granted because of this fact is a *method* differential, the Commission nevertheless contends that the total differential granted cost-plus purchasers is composed of mingled *method* and *quantity* discounts.

Where *method* and *quantity* differentials are thus intermingled, runs the argument, the Commission is free to impose a quantity limit rule and to leave it to the person granting or receiving the discount to defend and justify, in an adversary proceeding for the enforcement of the rule, that part of the differential which may be cost-justified on account of *method*.

However, as we have already seen, the Commission has failed to show that the cost-plus contracts involve *any* quantity differential.

But even if we assume for the sake of argument that part of the differential is due to *quantity* purchased, there would still be lacking any finding as to what part of the total differential is due to *quantity*.

Without a showing of the magnitude of the *quantity* differential, the Commission is incapable of making the other findings required by the statute. The Commission cannot determine how many available purchasers there are for the unknown quantities upon which a portion of the discount is given, nor can it possibly show that an unknown quantity differential is "unjustly discriminatory or promotive of monopoly".

The Commission's present findings are based upon the theory that the entire differential granted to cost-plus purchasers is due to *quantity*. With the admission that at least

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* Appellants' Brief, p. 41. The admission is carefully phrased and by no means ungrudging, but that is immaterial since the fact of the performance of services and the furnishing of facilities by AMOCO must be taken as true. AMOCO's verified complaint and affidavit to that effect have not been contradicted by the Commission.

part of the differential is due to *method,* these necessary findings collapse. For all the Commission has shown, that part of the discount which is based on quantity may result in a price no lower than is now available to many times the 63 purchasers deemed to be "too few" by the Commission. This leaves no basis for the alleged finding of "unjustly discriminatory" and "promotive of monopoly".

AMOCO's verified complaint and uncontradicted sworn statement that the lower prices it pays are related to the marketing costs it assumes leaves no opening in this proceeding for any other finding. But if some amount of quantity discount should be involved, the proposed application of Rule 203-1 must fail due to the absence of any finding as to the size of the *quantity* differential and the consequent impossibility of judging its effect on competition.

SUMMARY AND CONCLUSION

As this Court has recognized, the Cost Justification Proviso distinguishes between differentials due to differing *quantities* purchased and those due to differing *methods* of purchase. The Quantity Limit Proviso grants to the Federal Trade Commission authority to limit *quantity* differentials only. The Commission is, therefore, without power to apply its Quantity Limit Rule to AMOCO's cost-plus contract for each of three reasons:

1. AMOCO has shown that the lower price it pays under its cost-plus contract is due to a *method* differential;

2. The Commission has failed to carry its burden of showing that AMOCO's cost-plus contract establishes a *quantity* differential; and

3. It must be taken as true in this proceeding that AMOCO's lower price is due to its *method* of sale and delivery. And even if an element of quantity does inhere in cost-plus differentials as now asserted in the Commission's brief, the Commission has not made any finding as to the magnitude of any *quantity* differential that may be

present, and so cannot possibly make or support any of the other findings required by the statute.

The decision of the District Court denying Appellants' motion for summary judgment and granting Appellees' cross-motion for summary judgment should be affirmed.

Respectfully submitted,

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APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,108

FEDERAL TRADE COMMISSION, ET AL., *Appellants,*

v.

THE AMERICAN OIL COMPANY, *Appellee.*

No. 13,109

SIGURD ANDERSON, ET AL., *Appellants,*

v.

THE AMERICAN OIL COMPANY, *Appellee.*

Appeals From an Order of the United States District Court for the District of Columbia

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APPENDIX

Filed July 31, 1952

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Complaint for Injunction

Civil Action No. 3383-'52

THE AMERICAN OIL COMPANY, American Building, Baltimore 3, Maryland, *Plaintiff*,

against

FEDERAL TRADE COMMISSION, JAMES M. MEAD, LOWELL B. MASON, JOHN CARSON, STEPHEN J. SPRINGARN and ALBERT A. CARRETTA, Pennsylvania Avenue at 6th Street, N. W., Washington, D. C., *Defendants*

Plaintiff, complaining of Defendants, alleges as follows:

Parties

1. Plaintiff, The American Oil Company, is a corporation organized and existing under and by virtue of the laws of the State of Maryland and has its principal office in the City of Baltimore, State of Maryland.

2. Plaintiff is engaged, among other things, in the sale throughout the eastern section of the United States, under the trade-mark, "AMOCO", of replacement tires and tubes made of natural and/or synthetic rubber for use on motor vehicles. It purchases annually, directly from the manufacturer, tires and tubes in very substantial quantities.

3. Defendant, Federal Trade Commission (hereinafter sometimes referred to as the "Commission"), is an administrative tribunal created by the Federal Trade Commission Act of 1914, 38 Stat. 717, as amended, 15 U. S. C. A. § 41,

and is charged, among other things with the administration and enforcement of the Clayton Act as amended by the Robinson-Patman Act, 15 U. S. C. A. § 13. It is found and has its place of business and residence within the District of Columbia, 15 U. S. C. A. § 43.

4. The individual Defendants named above are all the members of the Commission and are found and have their places of business and official residences in the District of Columbia. Each is sued individually and as a member of the Commission.

Jurisdiction

5. Plaintiff is a citizen of the State of Maryland, and the Defendants are resident and are found in the District of Columbia. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000. The jurisdiction of this Court is invoked under § 11-306, § 11-315, § 11-324, and § 11-325 of the District of Columbia Code (1940 Ed. as amended); under the Act of June 25, 1948, 62 Stat. 930, 931, 28 U. S. C. A. § 1331, § 1332, § 1337; under § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A. § 1009, and under the Declaratory Judgments Act, 62 Stat. 964, as amended, 28 U. S. C. A. § 2201, § 2202. The action arises under the Constitution of the United States and the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. A. § 13, as hereinafter more fully appears.

The Statute

6. Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. A. § 13(a) provides in part as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality,

where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided,* however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: * * *"

The Quantity Limit Rule

7. Purporting to act under the so-called "quantity limit proviso" of the foregoing Section 2(a), on January 4, 1952 the Commission promulgated a quantity limit order designated as Quantity Limit Rule 203-1 to fix and establish a quantity limit as to replacement tires and tubes made of natural or synthetic rubber for use on motor vehicles, which

order was to become effective April 7, 1952 and reads as follows:

> "The quantity limit as to replacement tires and tubes made of natural or synthetic rubber for use on motor vehicles as a class of commodity is twenty thousand (20,000) pounds ordered at one time for delivery at one time."

8. The foregoing Quantity Limit Rule 203-1 was accompanied by "Findings" and "Statement of Basis and Purpose of Quantity Limit Rule 203-1" of the majority of the Commission and "Minority Findings" of Commissioner Mason.

9. Except as temporarily stayed by order of this Court, the Commission proposes to enforce said order against Plaintiff and against Plaintiff's actual and potential sources of supply of tires and tubes.

Plaintiff's Business

10. Plaintiff's principal business is the distribution and sale of gasoline and lubricating oils and greases for use in motor vehicles to distributors, retail dealers, consumers and operators of service stations. In conjunction with the sale of the foregoing products, Plaintiff also distributes and sells to most of its said customers large quantities of natural and/or synthetic rubber tires and tubes as well as a wide range of automotive accessories for replacement use in motor vehicles. The sale of tires and tubes and automotive accessories by Plaintiff enables it to benefit from the economies derived from the simultaneous marketing of varied but related items, and also enables Plaintiff better to serve its customers by making available to them, under Plaintiff's trade-mark and brand designation, a more or less complete line of related products having wide trade and consumer acceptance.

11. In the conduct of its business along the Eastern Seaboard of the United States, Plaintiff operates principal warehouses in twelve states and the District of Columbia and in excess of 100 sub-warehouses and storage facilities throughout the eighteen states making up its present marketing territory; in addition, it sells AMOCO tires and tubes to in excess of 350 wholesale distributors and jobbers in such marketing territory. Plaintiff sells AMOCO tires and tubes directly to approximately 7700 operators of retail gasoline service stations in its marketing territory, and Plaintiff's distributors serve an additional 6800 operators of retail gasoline service stations in said marketing territory. Thus, the aggregate number of retail outlets handling AMOCO tires and tubes acquired from Plaintiff or its distributor customers is in excess of 14,500, and the annual volume of sales amounts to in excess of seven million dollars.

12. Plaintiff purchases its tires and tubes from the Mansfield Tire & Rubber Company, located at Mansfield, Ohio, under a contract which may be terminated by either party upon six months written notice. Under this contract, Mansfield is bound to sell to Plaintiff at Mansfield's cost of manufacture plus six per cent. Molds used in the manufacture of tires for Plaintiff are purchased and owned by Plaintiff. All tires and tubes made by Mansfield for Plaintiff carry Plaintiff's trade-mark "AMOCO" and the designs for AMOCO tires and tubes are determined by Plaintiff.

13. AMOCO tires and tubes are supplied by Mansfield to Plaintiff at times and in quantities required by Plaintiff in such manner as to make possible the maximum economies in manufacture. By limiting the sizes of tires and tubes to those in greatest demand and restricting the number of different styles, further economies are obtained. Under the contract between Plaintiff and Mansfield, Mansfield is required only to obtain the necessary

raw materials and to fabricate the AMOCO tires and tubes. Plaintiff takes delivery f. o. b. Mansfield's plant and assumes responsibility for and the full costs of all transportation, warehousing and handling. Plaintiff performs the entire distributive function and bears all of the costs of selling, advertising and promoting the sale of AMOCO tires and tubes. In addition, Plaintiff handles all compliance with warranties and replacement of defective and rejected tires and bears the entire cost thereof.

14. Because Mansfield performs virtually no services other than that of manufacturing, and due to provision made for economies in the manufacturing operation as above set forth, lower prices charged to Plaintiff as compared with prices charged to purchasers of Mansfield's products bearing Mansfield's own nationally advertised trade-mark must be presumed to be more than offset by the lower costs applicable to tires and tubes made for Plaintiff. In addition, Plaintiff's method of contracting for its requirements and the orderly manner in which Plaintiff takes delivery reduces Mansfield's over-all costs applicable to sales of its products to all of its customers and thereby materially benefits its other customers and the ultimate consumers of its products.

15. Plaintiff, in the distribution of AMOCO tires and tubes, competes with Mansfield and with each of the other manufactures of tires and tubes, and with the suppliers of all of the numerous private brands of tires and tubes which are sold in its marketing territory. By reason of its cost plus contract, Plaintiff is enabled to compete as effectively as if it were itself engaged in manufacturing its own tires and tubes. Far from promoting monopoly, Plaintiff's sales of AMOCO tires and tubes has had, and can have, only the effect of intensifying competition through offering to distributors and dealers, and through them to consumers, an additional brand of tires and tubes of high quality and high public acceptance. It has benefited

Plaintiff's distributors and dealers by enabling them to sell under Plaintiff's well-recognized trade-marks, an additional line of products, thereby increasing their sources of revenue, decreasing their dependence on the sale of petroleum products only, and assisting them to offer better and more complete services and facilities to the public.

16. Plaintiff's AMOCO tires and tubes are sold at retail by more than 14,500 gasoline service stations who compete with many thousands of other service station operators and other types of tire dealers and retail tire outlets handling other competitive brands of tires and tubes. Plaintiff commenced to market its own brand of tires and tubes in 1944. Prior thereto and since then, the number of different brands of tires and tubes sold in its marketing territory has continually increased. The number of persons engaged in each stage of distribution, both at wholesale and at retail, has likewise continued to increase substantially. The increased competition thus engendered has involved no element of monopoly or discrimination, and has materially benefited consumers.

Quantity Limit Rule Illegal, Contrary to the Statute, and Unconstitutional

17. Quantity Limit Rule 203-1 is illegal, contrary to the statute, and unconstitutional, in the following respects and for the following reasons:

(a) It was promulgated without adequate notice, investigation or hearing as required by the Constitution, the Administrative Procedure Act and Section 2(a) of the Clayton Act.

(b) Neither the order nor the findings of the Commission are supported by the limited facts considered by the Commission. There is no evidence in the record before the Commission which supports a quantity limit of 20,000 pounds, or any quantity limit. Nothing contained in the

findings promulgated by the Commission supports a quantity limit of 20,000 pounds, or any other quantity limit.

(c) The Commission's order and findings are not in conformity with the quantity limit proviso of the statute in that:

(i) They were not promulgated "after due investigation and hearing."

(ii) The Commission's finding of "fewness" of available purchasers in greater quantities than that established by the quantity limit rule is arbitrary and capricious and unsupported by any facts of record. There is no evidence to support any finding of fewness of available purchasers within the meaning of the quantity limit proviso. Since the inception of Plaintiff's AMOCO tires and the private brand tires of other oil companies and other distributors, the number of sellers has increased at each level of distribution. The number of tire distributors in Plaintiff's market area, as well as nationally, has substantially increased due to the availability of the added brands. And the number of dealers handling tires, and the number of convenient locations at which tires are available have very substantially increased. Consumers have enjoyed a wider choice of tires, from a greater number of sources, and at a greater number of convenient locations. Prior to the inception of oil company private brands such as that of Plaintiff, few retail service stations offered tires and tubes for sale. Currently over 285,000 retail gasoline service stations throughout the United States sell tires not only under oil company brands but also under manufacturers' brands and other private brands.

(iii) Neither the evidence nor the findings of the Commission are concerned with differentials based on "quantities" as required by the quantity limit proviso. Instead the Commission confuses all price differentials regardless of whether based on "quantities" or "methods" of sale. The

Commission has not in fact made any study of price differentials attributable to quantities purchased. The ordinary manufacture and sale of tires involves a large bundle of services concerned with design, testing, manufacturing, financing, advertising, promoting and selling, warehousing, distributing and transporting. Under a contract such as that between Mansfield and Plaintiff, the manufacturer is in whole or in part relieved of the responsibility and cost of many of these services, i. e., design, testing, financing, advertising, promoting, selling, warehousing, distributing and transporting. Virtually only the process of fabrication remains to be done by the manufacturer. To the extent that the private brand distributor provides the services which would otherwise be the manufacturer's, it is entitled to, and must be permitted to, receive reductions in price which are justified by the manufacturer's reduction in costs or be foreclosed from effectively selling tires in competition with other distributors for whom services are provided by the manufacturer, who do not have to bear such costs. Under the quantity limit rule as promulgated by the Commission, the private brand distributor is required to compensate the manufacturer for services which the private brand distributor has itself undertaken at its own cost and expense and of which the manufacturer has been relieved. No allowance is permitted to the private brand distributor on account of the services assumed by it. The effect thereof is to discriminate against it by requiring it to pay for services which it has not undertaken to purchase and from which it does not benefit.

(iv) There is no evidence of record, and no facts have been adduced by the Commission, to support its finding that price differentials barred by the quantity rule are "unjustly discriminatory or promotive of monopoly." On the contrary, by eliminating private brands such as Plaintiff's, the effect of the quantity limit rule would be to promote monopoly.

The manufacture of tires by tire manufacturers for Plaintiff and other oil companies, and other private brand distributors, is the result of normal, sound competition. Those manufacturers which produce private brand tires do so to keep the business from going to competitors, or to dissuade private brand distributors from going into manufacturing, or to increase their own volume of production, thus reducing costs. By avoiding duplication of facilities and permitting more intensive utilization of existing facilities, the manufacture of private brand tires by tire manufacturers makes for greater efficiency, lower costs and lower prices.

Except for individual differences in efficiency, Plaintiff just as any other private brand distributor, enjoys no unlawful advantages with respect to purchasing, warehousing, distributing or selling tires and tubes. Tire dealers who are also retail gasoline dealers enjoy the advantage of location and access to the consumer, and thus provide better service. The advantages of location, access to the consumer, and superior service, are no basis for preventing sales of private brand tires by oil companies to gasoline dealers. Gasoline dealers handling tire manufacturers' brands enjoy these same advantages.

(d) Quantity Limit Rule 203-1, embodying the Commission's construction and application of the quantity limit proviso of Section 2(a) of the Robinson-Patman Act, is in violation of the due process clause of the Fifth Amendment for the following reasons:

(i) It is unreasonably vague and indefinite.

(ii) It is arbitrary and capricious and would deprive Plaintiff and its customers and ultimate consumers of the benefits of the efficiencies and economies inherent in Plaintiff's methods of buying and distributing tires and tubes without any adequate basis either in law or in fact.

18. By virtue of the foregoing facts a controversy exists within the meaning of the Federal Declaratory Judgments

Act between Plaintiff and Defendants as to the validity of Quantity Limit Rule 203-1.

19. The Quantity Limit Rule 203-1 is a final order for which review is provided in Section 10 of the Administrative Procedure Act.

Irreparable Injury and Peril to Plaintiff

20. Unless Quantity Limit Rule 203-1 is declared invalid and unenforceable, Plaintiff will be irreparably injured and will have no adequate remedy at law:

(a) Mansfield Tire and Rubber Company has informed Plaintiff and threatened that it will be forced to terminate its contract with Plaintiff in the event Quantity Limit Rule 203-1 becomes effective. Such action would completely disrupt Plaintiff's tire and tube business, lessen the value of its property, and render its operations more costly and less profitable.

(b) If Plaintiff should be compelled to purchase from Mansfield in accordance with the quantity limit rule, Plaintiff would be forced to pay Mansfield for services which Plaintiff performs. Plaintiff could not pay the cost of performing these services and pay Mansfield "phantom" costs covering these same services and still sell brand-name tires at a competitive price.

(c) The quantity limit rule threatens to destroy the value of the facilities established by Plaintiff to handle its tire and tube business and to injure materially the good will of its trade-marks and trade-names. Such facilities could not be utilized if Plaintiff were forced to pay the same price as all other purchasers of quantities of 20,000 pounds, even though it provided for itself numerous services which were furnished by the manufacturer to other purchasers.

(d) Failure of either Plaintiff or Mansfield to comply with the quantity limit rule subjects both to the immediate threat of triple damage suits by hundreds of dealers in tires and tubes, many of whom have been instrumental in initiating the proceedings which resulted in the rule and who have indicated a determination that the rule should be made effective.

(e) Plaintiff does not have available to it any action at law, and if such an action were available, the amount of Plaintiff's damages would be too speculative to permit of ascertainment in an action at law.

WHEREFORE, Plaintiff prays:

1. That a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending until further order of the Court the effectiveness, operation and execution of said Quantity Limit Rule 203-1 and any further action or proceeding by Defendants in the Matter designated File 203-1; and

2. That after final hearing this Court declare and determine Plaintiff's legal rights under said Rule and adjudge, order and decree that said Quantity Limit Rule 203-1 is in violation of the legal rights of Plaintiff and is wholly void and that said rule be perpetually vacated, set aside and annulled and the effectiveness and execution thereof perpetually be restrained and enjoined; and

3. That after final hearing this Court adjudge, declare, order and decree that no quantity limit rule promulgated by the Federal Trade Commission may affect or prevent differentials which make allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods by which replacement tires and tubes are manufactured, sold and delivered; and

4. That Plaintiff may have such other, further and different relief as the Court may deem just and proper.

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* * * * * * * * * *

Affidavit of J. J. Leu

J. J. Leu being duly sworn deposes and says:

1. I am Vice President of Operations and Services of The American Oil Company, plaintiff in the above captioned cause. My address is 122 E. 42nd Street, New York, New York.

2. I have read the complaint filed by The American Oil Company in the above captioned cause and verily believe that the facts alleged therein are true and correct.

3. I fear that if Quantity-Limit Rule 203-1 promulgated by the Federal Trade Commission becomes effective, our supplier of replacement rubber tires and tubes will discontinue selling to us under our present cost-plus basis rather

than risk extended proceedings before the Federal Trade Commission or treble damage actions by tire distributors and others. The American Oil Company has no control over the actions of its supplier nor does it have any means of protecting its large investment in the rubber tire and tube business except in this proceeding.

4. We are assured that our supplier of replacement rubber tires and tubes will continue to supply us under our present contract so long as Quantity-Limit Rule 203-1 does not become effective.

5. It is because we have no other remedy that The American Oil Company requests this court to stay the effective date of Quantity-Limit Rule 203-1 until its validity and the merits of this cause can be passed upon by the court.

/s/ J. J. LEU
J. J. Leu

Sworn to before me this
8th day of December, 1952

/s/ ALVIN LAZARD
Notary Public

ALVIN LAZARD
Notary Public State of N.Y.—No. 24-2281500
Qualified in Kings Co.
Certificates filed in Kings Reg.
N.Y. Co. Clk.—N.Y. Co. Reg.
Comm. Expires March 30, 1953

SEAL